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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION, a corporation,

Appellee.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF ON BEHALF OF APPELLEE.

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vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION, a corporation,
Appellee.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF ON BEHALF OF APPELLEE.

Preliminary Statement.

On April [redacted], 1939, appellant filed a complaint against the appellee in the New Jersey Supreme Court seeking a judgment for $8,500.00 plus interests and costs of suit. The complaint was grounded upon the theory that the appellant having become a member and shareholder of the appellee on October 1, 1928, was entitled to withdraw from such association and recover the value of his shares in accordance with the law with respect to withdrawal from such Associations as it stood at the time he became such member and shareholder, to wit, in accordance with Sections 49 and

52 of "An Act Concerning Building and Loan Associations, Revision of 1925," P. L. 1925, Chapter 65, that although he had on August 17, 1932 given notice of withdrawal to the appellee as required by said law, at which time appellee was solvent and although more than six months had elapsed the appellee failed and refused to pay appellant the value of his shares despite the requirement of the said statute that in no case should payment be postponed for a period longer than six months from the date of such notice of withdrawal and therefore that pursuant to said statute he became entitled to sue and recover the withdrawal value of his said shares (R. 1-4).

The appellee filed an answer April 24, 1939 denying appellant's right to recover and pleading as a First Separate Defense R. S. 1937—17:12-53 (R. 4-6).

Thereupon appellant gave notice of a motion to strike the answer of the appellee on the ground that the main answer was untrue in fact and sham and that the First Separate Defense was frivolous which notice was filed April 29, 1939 (R. 6).

Appellee in turn gave notice of a motion to strike appellant's complaint on the ground that it did not set forth a cause of action and that R. S. 1937—17:12-53 had not been complied with so that the Supreme Court was without jurisdiction to entertain appellant's claim, which notice was filed November 21, 1939 (R. 8).

These motions and the practice operative required the Supreme Court to strike the first defective pleading. That Court found appellant's complaint to be defective, ordered it stricken and entered judgment for the appellee (R. 10 and 11).

No opinion was filed by the Supreme Court in disposing of such motions.

Appellant appealed to the Court of last resort in New Jersey, the Court of Errors and Appeals charging that the Supreme Court erred in striking the complaint and entering judgment for the appellee and should have entered summary judgment for the appellant, in that R. S. 1937, 17:12-49, 17:12-50, 17:12-53, and P. L. 1933, Chapter 48, were unconstitutional and within the inhibitions of Article 4, Section 7, paragraph 3 of the Constitution of New Jersey; Article I, Section 10 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment of the Constitution of the United States and void so far as appellant's rights were concerned (R. 11 and 12).

At the time the notice of withdrawal was given by the appellant to the appellee, Section 52 of the Laws of 1925, Chapter 65, the law in effect when appellant acquired membership, had been amended by P. L. 1932, Chapter 102 (R. 9 and 13) and the appellant contended before the Court of Errors and Appeals that the 1932 Act was unconstitutional so far as he was concerned because it impaired the obligations of his contract of membership with the appellee (R. 13).

The Court of Errors and Appeals on September 22, 1939, based upon its prior decisions in *Bucsi* vs. *Longworth Building and Loan Association,* 119 N. J. L. 120, and *Rocker* vs. *Cardinal Building and Loan Association,* 119 N. J. L. 134, held that the Act in effect when the application for withdrawal was made (P. L. 1932, Chapter 102) governed the right to withdraw, that the Act was constitutional and that appellant had not pleaded facts bringing him within that Act. It therefore affirmed the action of the Supreme Court in striking appellant's complaint and entering judgment for the appellee (R. 12-15).

Despite the fact that the New Jersey Court of Errors and Appeals passed only upon the constitutionality of P. L. 1932, Chapter 102, appellant by his Assignments of Error (R. 15-18) and Points (R. 21) seeks merely a review and reversal of R. S. 1937, 17:12-53, and a declaration by this Court that the latter Act is unconstitutional.

Appellee moved to dismiss appellant's appeal on the ground that he seeks a reversal of an Act not passed upon by New Jersey's Court of Last Resort but this Court has noted probable jurisdiction. Nevertheless, appellee, conceiving that the matter of jurisdiction is a question to which the Court's attention may still be directed, particularly where, if appellee is correct in its contention, this Court in effect is being asked to render an advisory opinion, respectfully begs leave to argue preliminarily this question of jurisdiction.

The Court of Errors and Appeals of New Jersey Only Passed Upon and Decided the Constitutionality of P. L. 1932, Chapter 102, and Did not Pass Upon and Decide the Constitutionality of R. S. 1937—17:12-53.

The New Jersey Courts have on several occasions considered the Act of 1932 in withdrawal suits and have declared it constitutional as a proper exercise of the police power of the State, even where the shareholder had applied for withdrawal while the Act was still in effect under which he became a member, namely: Chapter 65, Laws 1925. *Bucsi* vs. *Longworth Building and Loan Association,* 119 N. J. L. 120, 194 Atl. Rep. 857. *Rocker* vs. *Cardinal Building and Loan Association,* 119 N. J. L. 134; see also *Rocker* vs. *Cardinal Building and Loan Association,* 13 N. J. Mis.

Rep. 397; *Fornataro* vs. *Atlantic Coast Building and Loan Association*, 10 N. J. Mis. Rep. 1248; 163 Atlantic 240; *Sommer* vs. *Workingmen's Building and Loan Association*, 17 N. J. Mis. Rep. 267; *Horowitz* vs. *Guaranty Building and Loan Association*, 17 N. J. Mis. Rep. 274.

Here the issue is even simpler than in such cases for the application for withdrawal by appellant was made months after Chapter 65, Laws 1925, had in fact been amended by Chapter 102, Laws 1932, so that the question before the Court of Errors and Appeals was simply whether the Act in effect when membership was acquired should govern or whether the law prevailing when the application was made applied. And incidentally that situation differentiates this case from that of *Treigle* vs. *Acme Homestead Association*, 297 U. S. 189; 56 Sup. Ct. Rep. 408, in which it was conceded that the shareholder had perfected his power to withdraw by actually applying therefor, before the new Act was passed.

Faced with the instant situation, the Court of Errors and Appeals determined that it was "entirely controlled by our holding in those cases," the Bucsi and Rocker cases, as indeed it was, for if a shareholder applying to withdraw under the Act in effect when he became a member, was nevertheless subject to a subsequently adopted regulation of the power to withdraw as within the police power of the State, manifestly appellant, who did not apply to withdraw until the State had elected to supplement the power to withdraw, could not successfully claim a vested right under the old law and that the new law impaired a contract.

It should be noted that the cases which the Court held to be controlling were decided prior to the adoption of the Revision of 1937, since that Revision was not enacted until

December 20, 1937, while the Bucsi and Rocker cases were submitted at the May, 1935, Term of the Court and decided October 26, 1937.

Furthermore, the Revision of 1937, of which the section here sought to be reviewed is a part, 17:12-53, was the work of years by a Commission appointed by the Legislature.

It is an independent enactment, Chapter 188, Laws 1937. It was not born of and in the conditions which the Court so strongly stresses in the Bucsi case and which evidently carried so much weight with the Court. How, then, can it be said that when the Court in the present case referred to the Bucsi and Rocker cases as controlling, it was passing upon a Revision with the development and enactment of which it must have been completely familiar?

Moreover, a mere examination of the Revision of 1937, 17:12-53, and Chapter 102, P. L. 1932, will demonstrate that they differ materially and that the Revision of 1937 varies more from Chapter 65, Laws 1925, Sections 49 and 52, much more, than does P. L. 1932, Chapter 102, if indeed the latter Act varies at all from the earlier Act in the light of its legal and proper construction and meaning. It would have been impossible for the Court of Errors and Appeals to have decided the constitutionality of Revision 1937—17:12-53 merely by the statement that its "holding" in the Bucsi and Rocker cases controlled.

As a matter of fact both appellant and appellee argued the constitutionality of P. L. 1932 and not the constitutionality of R. S. 17:12-53.

It is submitted that the issue before the Court was definitely whether appellant's complaint should be tested by the Act of 1925, Chapter 65, Sections 49 and 52 as appellant contended or P. L. 1932, Chapter 102, Sec. 52, as appellee submitted.

It is unfortunate that both in appellant's brief and in the opinion, in citing the Act of 1932, the section as enacted by the Revised Statutes of 1937 should also be cited as though identic with the Act of 1932. At least in the Court's opinion it is obvious that the Court did not intend to give the impression that the law as it stood in 1937 was the same as 1932 but rather to refer to the latest revision of the section. See the opinion on page 356 where it refers to "Chapter 65, P. L. 1925; R. S. 17:12-2, *et seq.*", the Revised Statutes reference being to the whole act as revised in 1937.

The Court said: "Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17:12-2, *et seq.*" Now obviously R. S. 17:12-2 was not in effect at the time of purchase and appellant is surely not claiming that he is to be governed by that Act; on the contrary he is claiming just the reverse.

Nor can the other reference to the Revised Statutes in the opinion be construed as an indication that the Court passed upon that Revision. The sentence reads: "But prior thereto (the application for withdrawal) the Legislature had amended the 1925 Statute by Chapter 102, P. L. 1932; R. S. 17:12-53." Certainly the Revision didn't amend the Act of 1925. It in fact repealed all prior laws. Nor was it enacted *before* appellant applied to withdraw, for he applied August 17, 1932 and the Revision was not enacted until December 20th, 1937. The reference by the Court to the Revised Statutes in this as in the other instance in the opinion was merely by way of reference to the law as existent when the opinion was written.

The wholesale reference to the Laws enacted regarding withdrawal after Chapter 65, Laws of 1925, as set forth in Paragraph 11 of appellant's complaint (R. 3), obviously could not strengthen his complaint or require the New

Jersey Courts to pass thereon, for as appellee stated in its Answer these allegations are argumentative in form and improper subject matter of complaint. As a matter of fact, appellee did not even answer such allegations (R. 5, Paragraph 11).

Nor could the pleading by appellee of R. S. 1937, 17:12-53 in its separate defense create an occasion for reviewing that section, for the record shows that neither trial court nor the Court of Errors and Appeals ever reached the answer from the standpoint of testing its legal efficacy. Both courts only considered the complaint as the first pleading showing a legal weakness and ordered it stricken.

That the law of 1937 could not apply is made manifest when it is realized that plaintiff-appellant's right of suit as claimed arose six months after the act of applying to withdraw, which six months expired February 17, 1933 from which date the six year Statute of Limitations would begin to run and would have barred the plaintiff-appellant had the statute been pleaded. This shareholder could not deprive the association of its right to plead the Statute of Limitations by invoking an act to govern his right of withdrawal that did not come into being until more than four years after he had applied for withdrawal.

We submit that appellant's appeal as framed should be dismissed. *McGoldrick Comptroller* vs. *Gulf Oil Corporation*, Decided January 15, 1940, U. S. Law Week, Jan. 16, 1940, Vol. 8, No. 3, Page 132 and cases cited in the opinion in such case.

However since this Court has noted probable jurisdiction and may therefore consider that P. L. 1932, Chapter 102 is properly here for review as one of the source statutes of Revision 1937, 17:12-53, we shall proceed to discuss the applicability and constitutionality of P. L. 1932, Chapter 102, but first we will summarize the issues involved.

Summary.

1. Appellant's power to withdraw must be governed by the Act in effect when he applied to withdraw, Chapter 102, Laws 1932 and not by the act in effect when he acquired membership, Chapter 65, Laws 1925, Sections 49 and 52.

2. Appellant's power to withdraw at the time the Act of 1932 was adopted was inchoate, a mere expectancy, and did not vest and was not perfected until the Act of 1932 had been enacted.

3. The case at bar is not controlled by the case of *Treigle* vs. *Acme Homestead Association*, 297 U. S. 189; 56 Sup. Ct. Rep. 408, for there the right to withdraw had been perfected by application before the amending act was passed; here the right to withdraw was perfected after the amendatory act was adopted.

4. To hold that appellant possessed a vested right of withdrawal under the Act of 1925 would result in inequity to his fellow members, preference to him at their expense and constitute a breach of his contract with them which calls for equality, mutuality and cooperation. He does not possess a vested right to work an injustice.

5. The power to withdraw, originally contractual, was made statutory in 1899 in New Jersey and ever since has not been the subject of contract and hence is not protected by the contract clause of the United States Constitution.

6. The power to withdraw subject to which appellant acquired his membership in the appellee was and is as much a part of the regulatory and supervisory control of such associations as the power to borrow, to invest, to declare dividends and to establish reserves and is equally subject to modification by the State and appellant can no more

possess a vested right in the statutory form that the State may have cast such power to withdraw than he would in such other powers or in any other police regulation.

7. Chapter 65, Laws 1925, is procedural in character and consequently subject to modification by the State.

8. Neither association nor member may contract with reference to such statutory privilege, nor waive, or barter or bargain it away. It is imposed upon association and member and always subject to alteration by the State.

9. Even if contractual, the power is subject to the proper exercise of the police power especially as building and loan associations are quasi public in character and appellant took subject to such power. P. L. 1932, Chapter 102 was a proper exercise of that power, especially as to an unperfected privilege.

10. No impairment of appellant's rights resulted from the adoption of the Act of 1932, since had the Act of 1925 been applied as appellant contends it must have resulted in those conditions within the association that would have prevented the payment of any withdrawals, levelled all shareholder rights and perhaps produced insolvency.

11. The Act of 1932 was substantially an express statement of the interpretation by the Courts of the Act of 1925 and the practice devised by the Courts to control such act to avoid the preference and discrimination that would have attended its rigid, legalistic application, and hence involved no real change in appellant's rights.

12. Appellant's complaint is insufficient to state a cause of action even under the Act of 1925 as interpreted by our Courts and as construed in the light of appellant's obligation to his fellow members.

The Power of a Building and Loan Shareholder to Withdraw From His Association Is Determined by the Statutes Regulating Withdrawal in Effect When the Application Is Made and Not by the Statutes in Effect When Membership Is Acquired.

At this point it might be well to describe a building and loan association and where it becomes necessary to refer to a statute the reference will be to the Revision of 1925, Chapter 65, P. L. 1925, as far as possible since that was the Act which was in effect when appellant acquired his shares and membership.

A building and loan association is a mutual, quasi-public, semi-philanthropic institution designed to teach thrift and to foster the home instinct, planned to make effective the savings of the workingman and small saver and particularly to enable him to acquire that home which makes for contented citizenship—12 C. J. S., Sec. 3.

Hopkins Federal Savings and Loan Association vs. *Cleary*, 56 S. Ct. 235, 296 U. S. 315; 80 L. Ed. 251, 100 A. L. R. 1403; *Hackler* vs. *Farm and Home Savings and Loan Association*, 6 F. Suppl. 610; *Folk* vs. *State Capital Savings and Loan Association*, 214 Pa., 63 Atl. 1013; *People ex rel. Fairchild* vs. *Preston*, 140 N. Y. 549; 35 N. E. 979; 24 L. R. A. 57; *Endlich on Building Associations*, 2d Ed. Chapter 1, Sections 7-12, and Chapter 2; *Day* vs. *Palisades B. & L. Assn.*, 124 N. J. Eq., 199 Atl. 400; *White* v. *Wogaman*, 54 P. (2d) 793, 47 Arizona 195, in which latter case the opinion contains a splendid description of the history, purpose, development and service of such institutions; 12 C. J. S., Sec. 3.

Its purpose is so salutary, its service so outstanding, that it enjoys legislative tendernesses, such as exemption from usury, income and other tax exemption and other benefits, while it is not the subject matter of bankruptcy—12 C. J. S., Sec. 4, Chapter 38; 47 Stat., Part 1; page 47; *U. S.* vs. *Cambridge Loan & Building Co.*, 278 U. S. 55; *Mutual B. & L. Assn.* vs. *Wilkinson*, 8 F. (2d) 183; 13 F. (2d) 997, 998.

It is a kind of incorporated partnership, the relation between its members is of a partnership nature and its fundamentals are equality, cooperation and mutuality.

> *Stone* vs. *New Schiller Building and Loan Association*, 153 A. 758; 302 Pa. 544; *Morris Resnick Building and Loan Association* vs. *Barnes*, 108 Pa. Sup. 218; 164 Atl. 358; *Cohen* vs. *Ziskind*, 195 N. E. (Mass.) 346; *Commonwealth* vs. *Home and Savings &c. Association*, 106 S. W. (Ky.) 221; *Fitzgerald* vs. *State Mutual Building and Loan Association*, 76 N. J. Eq. 137, 143; *Latimer* vs. *Equitable L. & I. Co.*, 81 Fed. 776; *Acklin* vs. *Peoples Savings Association*, 293 Fed. 392; *Bertche* vs. *Equitable L. & I. Co.*, 147 Mo. 434, 48 S. W. 954; *McPherson* vs. *Rivay S. & B. Co.*, 93 Colo. 155; 25 Pac. (2d) 388; *Saunders* vs. *State Building & Loan Association*, 121 Neb. 473; 237 N. W. 572.

Preferences are abhorrent to it; its shares are all common shares, though common shares payable in installments are defined as installment shares and shares paid in full are variously described as prepaid, full paid, paid-up and income shares, the correct name in 1925 being paid-up shares and now income shares—preferred shares are expressly forbidden; all members occupy the same relative

status as to debts and losses and all shares must be withdrawn on the same terms and conditions. Revision 1925, Chapter 65, Laws 1925, Sections 73 and 74; *Moore* v. *Conover*, 123 N. J. Eq. 61, 195 A. 833; *Fitzgerald* v. *State Mutual B. & L. Ass'n*, 76 N. J. Eq. 137-143.

A member remains a member until paid, Section 5, Chapter 65, P. L. 1925; *Sommer* v. *Workingmen's Building and Loan Association*, 17 N. J. Misc. Rep. 267, clarified and emphasized by P. L. 1932, Chapter 102, Section 52, and P. L. 1935, Chapter 59, Section 52.

Mutual B. & I. Co. vs. *Frederick*, 43 Ohio App. 270, 183 N. E. 114; *Frederick* vs. *Mutual B. & I. Co.*, 128 Ohio State 474; 191 N. E. 729.

At any stage of its existence it will have shareholders systematically or optionally paying on free shares looking toward the maturity of the shares; withdrawing or terminating members, those who because of fear, need or some other cause desire to quit the adventure and get their money back, full paid shareholders, those that have paid the maturity value of their shares and receive dividends thereon, and the borrowing member, he who receives the maturity value of his shares as an advance, to enable him to buy or build a home and who agrees to make payments on such shares until they mature, giving a bond and mortgage as evidence of such obligation and security therefor, that member whose mortgage debt becomes due in full in the event of dissolution or insolvency, with the liquidation of the assets of the association ultimately determining the value of his shares.

Revision 1925, Chapter 65, Laws 1925, Sec. 73; *Clarksville B. & L.* vs. *Stephens*, 11 Green 351; *Mechanics B. & L. Association* vs. *Conover*, 14 N. J. Eq. 219, 224;

Thirteenth Ward B. & L. Association vs. *Weissberg*, 115 N. J. Eq. 487, 170 Atl. 662;
Weir vs. *Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643;
N. J. Building Loan & Invest. Co. vs. *McNulty*, 71 A. 493.

Such associations are so closely regulated as to the establishment of reserves, the declaration of dividends, the borrowing of money, making investments, paying withdrawals and maturities and in other respects as virtually to be creatures of statute in duty bound to obey the statutory mandates and make effective the public policy of the state evidenced thereby. 12 C. J. S., Sec. 4 and cases cited:

Chapter 65, Laws 1925; Sections 69, 18, 20, 26, 49 and 52;
Moore vs. *Conover*, 123 N. J. Eq. 61, 195 Atl. 833, as to borrowing history and power.

Supervision is exercised by a Department of Banking and Insurance with wide powers, including the power to discontinue illegal or unsafe practices, and to take over, conserve or liquidate associations, the system being so comprehensive as to forbid the appointment of a Receiver by State or Federal Court in the absence of proof of refusal to act or abuse of power.

P. L. 1925, Chapter 65; Sections 56-59, inc.;
Day vs. *Palisade B. & L. Association*, 199 Atl. 400;
Fulia vs. *Warranty B. & L. Association*, 5 F. Suppl. 952;
Renold vs. *Withers*, 13 F. Suppl. 921;
Wandell vs. *Jefferson B. & L. Association*, 60 N. J. L. J. 9;
Krinke vs. *Guarantee B. & L. Association*, 112 N. J. L. 317; 170 Atl. 637;
P. L. 1891, Chapter 6.

Where an association is a member of a Federal Home Loan Bank or is insured by the Federal Savings and Loan Insurance Corporation, additional supervision and control exists.

The charters of and general acts under which such associations are created are subject to alteration or repeal by the legislature.

N. J. Constitution, Section 7, Par. 11;
Chapter 65, Sec. 4, Pl. L. 1925;
2 C. S. 1600, 1601.

When normally operating the intake from savers, investors and borrowers is ample to take care of the small minority of terminating members, but beginning with 1930 the scourge of unemployment played havoc with the intake side of the business, especially in the large cities, while creating abnormal demands for money saved and foreclosures and real estate acquisitions so that the intake of the associations soon, in too many associations, was woefully insufficient to meet the increasingly constant demands of terminating or withdrawing members.

Summary of Report of Committee on Trends, U. S. B. & L. League, as reported in Savings & Loan Journal for November 1939 and Report itself.

The public character of these institutions and the inherent power of the State to control and regulate such creations so as to promote the general welfare of all the people will be apparent and especially so when it is realized that at the advent of the depression, approximately one out of every four of the inhabitants of New Jersey was a shareholder and the fifteen hundred or more associations

of the State, held assets of in excess of a billion and quarter dollars.

The power of withdrawal is a characteristic of this type of institution.

Its existence is essential to the growth and development of an association, for according to a recent report of the Committee on Trends of the U. S. Building & Loan League, surveys of public opinion in 1934 and 1938-1939 clearly indicated that next to safety the public desired liquidity in a building and loan association. Savings and Loan Journal, November, 1939. On the other hand its undue exercise may be productive of grave danger if not death to the association. In a word it may make or break an institution. It will be obvious therefore that this power must be delicately balanced and carefully managed and regulated if the public purposes of such associations are to be achieved. The creation by Congress of the Federal Home Loan Bank System to create greater liquidity in such associations through enabling them to discount their mortgages at a member Bank and the insurance of the shares of such associations by the Federal Savings and Loan Insurance Corporation is a recognition by the Congress of the public importance of such institutions and the necessity of preserving them against the undue exercise of the withdrawal power in time of stress.

Thus the control of this power by the State as a part of a system of regulation is as important as the control of the power to borrow, to invest, to declare dividends and to establish reserves.

And yet originally no such control existed. Indeed in their initial form no power to withdraw from Building and Loans existed at all; withdrawal was akin to breach of contract and entailed forfeiture and when finally conferred was the creature of by-law or statute.

Thirteenth Ward B. & L. Association vs. *Weissberg*, 115 N. J. Eq. 487; 170 Atl. 662.

Prior to 1899 the power to withdraw was wholly contractual, conferred, if at all, by a constitution or by-law of an association. It was wholly unregulated by the State.

It is not strange then with National, State and local associations operating under pitifully inadequate statutes that the control of such institutions too frequently fell into the hands of promoters, speculators and unscrupulous individuals more interested in self than those they represented or the community and that the scandal resulted which the Court speaks of in the Bucsi case.

Withdrawal was granted or withheld according as competition dictated, operating expenses were excessive, deductions on withdrawal unconscionable and the instinct of thrift too frequently sacrificed upon the altar of private greed.

The brief of Messrs. Warren and Simandl submitted on the reargument of the Bucsi and Rocker cases in the New Jersey Court of Errors and Appeals after the decision of this Court in the Treigle case, devotes forty-seven pages to the history of the building and loan in New Jersey with particular reference to this period of contractual control, and mismanagement of the power to withdraw and shows graphically and vividly the crying public need for withdrawal legislation recognized and demanded by the Governors of this State, the Chiefs of the Bureau of Labor Statistics, the Banking Commissioners, the press, two legislative committees and a grand jury. We plan to procure a copy of such history for the Library of this Court. See also History of Building and Loan Associations in the United States, pages 100-103, inc., and particularly that portion relating to New Jersey, at pages 488-491.

Responsive to this public demand the Legislature finally in 1899, P. L. 1899, Chapter 160, took from such associations the power to control this power contractually and placed it beyond the reach of private temptation and spoils. The State undertook to regulate and control this Damocles-like power in the interest of all the people and has controlled and regulated it from time to time in the light of existing conditions.

In 1903, P. L. 1903, 457, 1 C. S. 334, it adopted the first comprehensive B. & L. statute and by sections 38 and 39 established the statutory power of withdrawal which when the Revision of 1925, Chapter 65, P. L. 1925, was adopted become sections 49 and 52, those relied upon by appellant here. The power was amended in 1932, P. L. 1932, Chapter 102, in 1935, Chapter 59, Laws 1935, Chapter 118, Laws 1936 and finally R. S. 1937, 17:12-53, a practical reenactment of the withdrawal law of 1936. Thus as early as 1899 and more definitely so since 1903 the State has elected to control and regulate this withdrawal power and so establish the public policy of the State as to withdrawals, and subject to which policy and control appellant acquired his membership in 1928.

> *Thirteenth Ward B. & L. Assn.* vs. *Weissberg*, 115 N. J. Eq. 487, 492 and 493; *Adams* vs. *Union National S. & L. Association*, 55 Ind. A. 676; 100 N. E. 389, 102 N. E. 145; *Latimer* vs. *Equitable Co.*, 81 Fed. 776.

When the power was contractual it was subject to modification by amendment of the constitution or by-laws of an association.

> *Johnson* vs. *Mutual Guarantee B. & L. Association*, 66 N. J. L. 683; *Englehardt* vs. *Fifth Ward, etc. Association*, 148 N. Y. 281; *Beardon*

vs. *Peoples Building & Loan Association*, 49 S. W. (Tenn.) 64; *Stillwell* vs. *Peoples Building & Loan Association*, 54 P. 14, 19 Utah 257; *Frederick* vs. *Mutual Building & Invest. Co.*, 191 N. E. 729, 128 Ohio State, 474; certiorari denied 55 S. Court, 239; 293 U. S. 624, 79 L. Ed. 711;

And it is significant that in *Intiso* vs. *Metropolitan Savings Association*, 68 N. J. L. 588; 53 Atl. 206, the Court denied the power of the Legislature to alter such contractual power.

We say it is significant for this decision was in 1902 and related to the situation as it existed upon the adoption of the first statutory power of withdrawal in 1899, and read in the light of the comprehensive building and loan act enacted in 1903 with the power to withdraw and the terms thereof worked out, can only mean that the Legislature intended to do away with the situation where the State was powerless to control such transactions and instead place such transactions subject to the regulatory police power of the State. And in so doing it did not intend that a power which when contractual and in the control of management was subject to modification at slimly attended shareholders meetings, should in the hands of the State *be frozen in a membership contract and forever freed of State regulation or control.* On the contrary it was doing just the reverse, changing the power from a dubious contractual right to a police regulation as much an integral part of its system of supervision and control of such associations in the general welfare as the powers to borrow, invest or declare dividends and the duty to set up reserves.

Thus the new era began and all shareholders acquired membership in such associations charged with knowledge of such State power and subject thereto.

Agnew vs. *Macomb B. & L. Association*, 64 N. E. 260; *Rocker* vs. *Cardinal B. & L. Association*, 13 N. J. Misc. Rep. 397, 409; *Columbia B. & L. Association* vs. *Jungquist*, 111 Fed. 645; *Daley* vs. *Peoples B. & L. Ass'n.*, 52 N. E. 1090, 172 Mass. 533.

Hence the appellant when in 1928 he became a member of the appellee did so subject so far as the power to withdraw was concerned, to the power of the State to alter, or amend or supplement the police regulation then in force as to withdrawals, to wit:

Sections 49 and 52, Chapter 65, P. L. 1925; *Hackler* vs. *Farm and Home S. & L. Association*, 6 Fed. Suppl. 610; *Union Savings & Investment Co.* vs. *Salt Lake County*, 44 Utah 397; 140 Pac. 221.

To contend as he does now that he acquired a vested right in the power of withdrawal as it stood at the acquisition of membership, is to destroy the very purpose of the Legislature in removing the power from management and a contractual status to the State and a statutory basis.

To so contend is to claim that the State may contract away its police power or that the association, the State's creation, may so contract as to oust the State of control and regulation of and over this vital element of a building and loan association. This is not the law. *Texas and N. O. R. Co.* vs. *Miller*, 221 U. S. 408, in which this Court in rejecting the claim that a provision in a railway charter exempting the company from liability for the death of its servants, even if caused by the company's negligence, was within the protection of the contract clause of the U. S. Court, because

the subject was one over which the Legislature possessed a regulating but not a contracting power said:

> "The doctrine that a corporate charter is a contract which the Constitution of the U. S. protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction." See also *Boston Beer Co.* vs. *Massachusetts,* 97 U. S. 25, 24 L. Ed. 989.

Again in *State* vs. *Massillon S. & L. Co.,* 110 Ohio State, 320, 143 N. E. 894, the Court in determining that a contract by the association providing for the sale of stock memberships in the association was governed by subsequent legislation forbidding such sales held that:

> "While the state may not impair a completed contractual obligation, a building and loan company cannot so enter into contracts, reaching into the future touching the sale of its stock and memberships, as to deprive the state in the proper exercise of its police power from controlling such sales in the future." *Syllabus.*

So here neither the State nor the appellee had the power to create a contract of membership embedding Chapter 65, Laws, 1925, Sections 49 and 52 in it as that the State could not by P. L. 1932, Chapter 102 modify such sections before the Appellant exercised such power to withdraw.

To contend as does the appellant is to claim he acquired a vested right in the then method of regulation of withdrawals devised by the Legislature to govern a solvent and

going association and that never could it modify that procedure to meet new conditions and situations or to profit by experience. To so contend is to hold that a power which the State need not have conferred, must, once conferred, remain as unchangeable as the laws of the Medes and Persians. Fortunately for the people of this State this is not the law. The right is not a vested one. It is at best a mere expectancy subject to change by the Legislature, at least until perfected by application for withdrawal and the elapsing of six months therefrom.

In *Bedford* vs. *Eastern B. & L. Association*, 181 U. S. 227, a case cited on the brief of appellant, this Court held that, the issuance of a certificate of stock to a member of a foreign loan association, *and his application for a loan*, (italics ours) made before the passage of a statute restricting the right of the association to do business in the State, constituted a contract, the obligation of which could not be impaired by such statute; and therefore a loan made on that application after the statute was passed and to which his contract gave him a right, is valid, notwithstanding the statute. The Court said: "The building association was incorporated under the laws of N. Y. to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing,—means in the treasury, *a tender of good security*, (italics ours)—the contingent right became a vested one, a contract was formed; and can there be doubt that it was enforceable against the association."

And in *Pearsall* vs. *Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838, it was decided that a bare unexecuted power to consolidate with other corporations, given to a railroad company by its charter, is not, so long as it continues unexecuted, a vested right protected from

control or revocation by the Legislature,—at least so far as it applies to parallel or competing lines.

In *Nelson* vs. *Kilgore*, 145 U. S. 487, 12 S. Ct. 943, 36 L. Ed. 786, in holding that a law of Tennessee which declared that the rents and profits of a married woman should not be subject to the debts of her husband, was valid as applied to a judgment against the husband rendered before the passage of the Act, the Court laid stress upon the fact that when the Act was enacted the particular profits of the wife's estate had not come into the hands of the husband; they were not vested in him, he had a mere expectancy. He had not exercised his right to reduce the profits to possession.

> See also *Leach* vs. *Commercial Savings Bank*, 205 Ia. 1154; 213 N. W. 517, 521. Sutherland on St. Const., Sec. 163; Cooley Const. Lim. (7th Ed.), 359, 360; 4 R. C. L., Sec. 16; *Dodge* vs. *Board of Ed. of Chicago*, 5 N. E. (2d) 84, 364 Ill. 547; *Peenie* vs. *Reis*, 132 U. S. 464; 10 S. Ct. 149, 151, 33 L. Ed. 426.

In *Shore* vs. *Lone Star B. & L. Association*, 71 S. W. Rep. (2d) 863, when the association was incorporated no statute existed regulating membership fees but the association adopted a fee in its by-laws and made a contract with one Elkon as its sole agent to sell stock and memberships for ten years, he to get $2.25 out of every $2.50 membership fee. Subsequently a statute was passed fixing a maximum membership fee to be charged by building and loan associations, which fee was less than the by-law and contract membership fee. Held that the state had the power to pass such legislation, that the state's reserved power in the premises could not be contracted away as provided in the Elkon contract and that the new statute did not impair the obligation of contract. See also *Holland* v. *Nakdimen*, 177

Ark. 920; 9 S. W. (2d) 307, a somewhat similar situation involving a Bank and interest contracts.

In *Huber* vs. *Home Savings and Loan Association*, 169 Pac. Rep: 979 (Wash.), plaintiff, who became a member of the association on March 28, 1907, sued to recover the withdrawal value of his shares. The Court said:

> "The withdrawal value of respondent's stock is not to be determined by the act of 1903, but by Chapter 110, Laws of 1913, p. 326 (Rem. Code, Sec. 3601-1, *et seq.*);
>
> The withdrawal value of the stock must be determined by the financial condition of the association and the laws in force at the time of the withdrawal under which each share of stock is chargeable with its pro rata share of loss."

The case of *Interstate B. & L. Association* vs. *Hafter*, 24 Southern 871, 76 Miss. 770, holds that a by-law of a building and loan association permitting loans to be paid off before maturity on the estimated basis that 84 payments of dues and interest would mature the borrower's stock and cancel the debt may be repealed, as against a *borrower who has not sought to take advantage of it up to the time of repeal* (italics ours), where at the time the loan was made the by-laws provided that they might be amended.

On the other hand, in *Interstate B. & L. Association* vs. *Wooten*, 113 Ga. 247, 38 S. E. 738, the reverse view was expressed because the Court considered that borrower's mortgage contract did not contain the right to amend the by-laws so as to bind the borrower. But as to free shareholders like the appellant here, the Court said:

> "Where one, on joining a building and loan association, voluntarily consents that it may subsequently alter, amend or repeal their existing by-laws . . . the only vested right which he acquires by reason of

his contract of membership is that he shall at all times stand upon an equal footing with his fellow members as regards the privileges extended to and the burdens imposed upon them. This being so, should he thereafter desire to rescind that contract and cease to be a member, he would be entitled *to do so upon such terms only as the association was for the time being inviting its stockholders to accept, though upon his giving due and formal notice of his acceptance of the offer then extended to members wishing to sever their connection with the association his privilege of withdrawing therefrom upon those terms would immediately become a vested right,* which could not be defeated by its tardily undertaking by means of a change subsequently effected in its by-laws to recall the offer thus voluntarily made by it." (Italics ours.)

The only vested right the appellant possesses is a vested right to equality of treatment with his fellow members; what he desires is a vested preference, a fixed discrimination.

Each shareholder, upon becoming a member of this association, agreed with every other shareholder that he would share with him equally the profits and bear with him equally the losses of the common enterprise, would not be entitled to any preferences and that equality would prevail in withdrawal. See especially Section 74, Chapter 65, Laws 1925. Each shareholder, upon accepting his certificate of stock, agreed that he would be a mutual participant in the fortunes of the association, whether good or bad.

Towle vs. *American B. & L. & Investment Society*, 60 Fed. Rep. 131; 75 Fed. Rep. 938; *Endlich Building Association* (2d Ed.), Sections 121-123, 514, 523, 524, &c.; *Stone* vs. *Schiller Building and Loan Association*, 302 Pa. 544, 153 Atl. 758, 760; *Publicker* vs. *Potash Bros. B.*

& L. Association, 104 Pa. Sup. Ct. 530; 159 Atl. 58.

Times having changed, the Association having fallen on evil days, the appellant rejects the agreement of equality and wants to leave the venture with his investment and let his fellows fend for themselves.

This he cannot do. Chief Justice Parker, in *Foster* vs. *Essex Bank,* 16 Mass. 245, is quoted in *Freeborn* vs. *Smith,* 2 Wall. 160, 17 L. Ed. 922, as follows:

> "The truth is, there is no such thing as a vested right to do wrong, and the Legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

Neither is there a vested right to work an inequity and it would produce gross discrimination and preference to permit appellant merely because he has elected to terminate his membership contract, to sue and recover from the appellee at a time when changed conditions, depleted receipts, frozen assets and widespread economic distress, find appellee, in that condition where to pay appellant may well result, upon the ultimate disposal of its assets, in appellant's fellow members getting proportionately less of the assets of the common enterprise than appellant should have been paid. If the right to defeat a just debt by the statute of limitations is not a vested right, *Campbell* vs. *Holt,* 115 U. S. 620, 6. S. Ct. 209, 29 L. Ed. 483, no more is there a vested right in a statute productive of inequity and inequality.

If Chapter 65, Laws 1925, means what appellant declares it means and applies despite the changed conditions, then obviously the Legislature enacted either an unwise or

an inadequate withdrawal regulation, and consequently possessed the right to correct, to cure, the situation in the interest of all the members, so as to accomplish the equality all bargained for; or if the statute is unclear in its application the Legislature may clarify it. *Garland* vs. *Filmer*, 1 Fed. Suppl. 8. And in repealing the right of suit after six months non-payment, retaining the payment of withdrawals in order of filing and the one half of receipts application, subject only to equal distribution among all withdrawing shareholders where such receipts should prove insufficient to pay all such shareholders, with the right of suit if the new method of payment should not be followed, the L. slature sought only to cure a discriminatory, inequitable, preferential condition likely if persisted in, to produce insolvency, foreclosure, loss of homes, economic distress and to deprive the community of the service of hundreds of such public service, character and home building agencies. And appellant not having exercised his right under the defective statute is bound by the curative or clarifying one for he is not only presumed to consent to right the wrong, *Randall* v. *Krieger*, 23 Wall 137, 23 L. ed. 124, but has by his contract with his fellow members agreed so to do. *Stone* vs. *Schiller B. & L. Assn.*, 302 Pa. 544; 153 Atl. 758, 760; *13th Ward B. & L. Assn.* v. *Weissberg*, 115 N. J. Eq. 487, 495, 170 Atl. 662, 665.

It should be realized that if appellant merely by virtue of his membership contract, possesses a vested right in the State police regulation of 1925, then, despite the statute, Sec. 74, Chapter 65, Laws 1925, forbidding preferred shares, appellant is a preferred shareholder while his fellows who continue their savings and the borrowing members are mere common shareholders and that he is entitled to withdraw on terms variant from those upon which shareholders being members subsequent to 1932 may withdraw and this in

the face of the statute providing for equal withdrawal privileges.

If this is so, since the withdrawal power was changed in 1932, 1935, 1936 and 1937, we have in one association common shareholders with preferred rights, under each succeeding regulation change. It would make for confusion worse confounded, beget a variety of liabilities in the same class of contracts and among members having equal rights in the assets of the association and equally responsible for its losses and must be rejected because it would be at war with the whole scheme of mutual co-operative saving and home building so highly prized and carefully nurtured by the State and nation. *Supreme Lodge K. of P.* v. *Hunziker*, 121 Ky. 33, 87 S. W. 1134.

Having in mind appellant's entire membership contract with his association and his fellow-members, the sound construction of it is that until he avails himself of the regulation in effect at purchase of his shares the regulation may be changed and he governed thereby and even after application the State in the proper exercise of its police power may modify such privilege.

"The right of withdrawal which is a peculiar feature of building and loan associations is not conferred upon a member for the purpose of enabling him to escape his just proportionate responsibility for losses incurred by an insolvent Association but for the purpose of securing to each member the privilege of withdrawing his proportionate share of the accumulated funds. It would be to pervert the privilege to allow it to be used for the purpose of obtaining an unjust advantage over the fellow stockholders of the withdrawing member. . . ." 4 R. C. L. 355.

But in Any Event the Regulation of 1925, Sections 49 and 52, Chapter 65, Laws 1925, Is a Mere Statutory Privilege or Simply Procedural in Character.

If it is simply a procedure whereby the privilege of withdrawal may be enforced, management compelled to apply receipts in its possession to the payment of appellant's demands, the right to sue after six months non-payment, is then subject to modification by the State. *Terry* v. *Anderson*, 95 U. S. 628, 24 L. ed. 365, where the Court declared:

> "And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy it is well settled that the legislature may change them at its discretion provided adequate means of enforcing the right remain".
>
> *Oshkosh Waterworks Co.* vs. *City of Oshkosh*, 187 U. S. 439, 23 S. Ct. 234, 47 L. ed. 249; *Natl. Surety Co.* v. *Architectural*, 226 U. S. 276, 33 S. Ct. 17, 57 L. ed. 221; *Robinson* v. *Howe*, 13 Wis. 341.

If the regulation or privilege in question is purely statutory in origin unknown to the common law, then that which the state gives it may take away as long as the right is inchoate and has not been exercised. The privilege here is of statutory origin, is unknown at common law. Indeed

it did not exist as a matter of statutory privilege and protection prior to 1899 and once was denied altogether. And appellant did not elect to exercise the right until after it had been altered. *Kimbro* v. *Colgate*, 5 Blatchf. 230; Fed. Case No. 7,778, *Willcox* v. *Edwards*, 123 Pac. 277; *Moss* v. *Smith*, 155 Pac. 90; *Curran* v. *Owens*, 15 W. Va. 208; *Pittsley* v. *David* (Mass.), 11 N. E. (2d) 461; *The East Saginaw Salt Mfg. Co.* v. *The City of East Saginaw*, 13 Wall. (U. S.) 373; *Louisiana* vs. *Mayor &c.*, 109 U. S. 285; *Leak* v. *Gay*, 107 N. C. 468, 12 S. E. 312 and *Rosenplanter* v. *Provident Sav. Life Assurance Society of New York* (C. C. A. Tenn. 1899), 96 F. 721, 727, affirming C. C. 1899, 91 F. 728. Policy not forfeitable without certain prescribed statutory notice. Requirement later repealed and after contract of insurance had arisen. Repeal not impairment of contract. "It was only a statutory regulation for the government of insurance companies".

There is "a distinction between those rights which the law gives to, or obligations which it imposes upon persons in certain relations, merely in carrying out its own view of policy, and independently of any stipulation which the parties may have made and those rights which the law itself, even in carrying out some matter of general policy authorizes to be made the subject of express contract between the parties. In the former case, the rights being derived entirely from the law, and not from the contract, laws changing them are not within the prohibition (the contract clause of Constitution). But in the latter case, although the law authorized the rights to be acquired, yet it authorized them to be acquired only by a contract stipulating for them, and having been so acquired such contract must be held to be within the protection of the Constitution.

The question therefore is, not whether the right was acquired in the execution of some measure of public policy

but whether it was derived from the law only, or was stipulated for in a contract which the law itself authorized the parties to enter into. In the former case, the law may withdraw the right it granted, but in the latter having found it necessary in accomplishing its object to resort to the agency of actual contracts it cannot after they are made impair their obligation." *Robinson* v. *Howe*, 13 Wis. 341. See also *Islais* v. *Matteson*, 35 Pac. (2d) 1051, 78 Cal. App. Dec. 816. The right here was given members of building and loan associations regardless of and despite their membership contract. It was imposed upon all associations. It may not be contracted away, waived or avoided and by-laws or contracts so doing are void. *Society* v. *Clements*, 140 U. S. 266, 11 Sup. Ct. 822; *Latimer* v. *Equitable L. & I. Co.*, 81 Fed. 776; *Adams* v. *Union Natl. S. & L. Assn.*, 55 Ind. A. 676, 100 N. E. 389, 102 N. E. 145. The association and prospective or actual members were in fact forbidden to contract for or about it. They made their contracts subject to it. It was not a part of the contract, it was above and beyond and dominated whatever contract was made. It reflected the state's policy and neither association nor member could take it or leave it. They must take it or not contract at all. No question of mutual assent, bargaining at arm's length or otherwise, or the meeting of minds is involved with this statutory imposition. As our highest court has said: "The right of withdrawal springs from the statute, and not from contract. The shareholders could not, of course, by constitution or agreement, override the statute." *Thirteenth Ward B. & L. Assn.* vs. *Weissberg*, 115 N. J. Eq. 487, 494. And again at page 493: "The right to withdraw, without the forfeiture of the money paid in, is in its essence a privilege." See also *Rocker* vs. *Cardinal B. & L. Assn.*, 13 N. J. Misc. Rep. 397, and *Fornataro* vs. *Atlantic Coast B. & L. Assn.*, 10 N. J. Misc. Rep. 1248, 163 Atl. 240, where the

power to withdraw was held to be a statutory privilege. Hence the power to withdraw not being contractual, it is denied the protection of the contract clause of U. S. Constitution and may be changed by the State, at least until the right has been exercised. *Crane* v. *Hablo*, 258 U. S. 142; *Louisiana* vs. *Mayor*, 109 U. S. 285; *Morley* v. *Railway Co.*, 146 U. S. 162, interest not provided for by contract but by statute is changeable by legislature without impairment of contract; *Leak* v. *Gay*, 107 N. C. 468, 12 S. E. 312.

The case of *Coombes* vs. *Getz*, 285 U. S. 434-452, cited by appellant in his brief, far from supporting the position of appellant, recognizes the situation contended for by the appellee, for in that case the court found that the right of the petitioner there to enforce liability "had become fully perfected and vested prior to the repeal of the liability provision." Not so here. Moreover, the court found there that the petitioner's cause of action was not purely statutory. It arose upon a contractual liability and the court distinguished the situation there from the cases of *Moss* vs. *Smith* and *Wilcox* vs. *Edwards* herein cited as supporting the position of the appellee.

Likewise, the court, in the *Coombes* case, recognized that the *Ettor* case, 228 U. S. 148, also cited by the appellant, was one in which the rights had vested and not a situation where the right was inchoate as here. As Justice Sutherland said in comparing the case of *Napa State Hospital* vs. *Flaherty*, 134 Cal. 315, 66 Pac. 322, with the situation in the *Coombes* case, "The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. (So here.) No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. (So here.) No element of a contract was present. (So here.) Here both parties acted." In our case neither party acted with re-

gard to the power to withdraw, for under the law they could not.

The power of withdrawal in New Jersey is purely statutory and in no sense contractual.

Nevertheless, Even if the Power Is Contractural and Vested It Is Subject to Modification in the Proper Exercise of the Police Power of the State, and P. L. 1932, Chapter 102, Was a Proper Exercise of that Power.

Building and Loan Associations are proper if not special subjects of legislative control, regulation and supervision and strictly and particularly within the internal police power of the State. They are subject to such reasonable regulations as the State may impose in the exercise of such power in the interest of the protection of the public and for its good and welfare. The following cases sustain this statement and illustrate its application, in most of the cases, to building and loans, their relations, contracts and governing legislation.

Lowell Co-Operative Bank vs. *Co-Operative Central Bank (Mass.)*, 191 N. E. 921; *Un[illegible] S. & Invest. Co.* v. *District Court*, 44 Utah 397, 140 Pac. 221; *State* v. *Massillon S. & L. Co.*, 110 Ohio St. 320, 143 N. E. 894; *Stone* v. *Mississippi*, 101 U. S. 814; *Bank of Oxford* v. *Love*, 250 U. S. 603; 40 S. Ct. 22, 64 L. ed. 1165; *In re: Opinión of the Justices*, 181 N. E. 836, involving bill to establish a Central Bank for Massachusetts Building & Loans; see also 181 N. E. 833.

Since such associations and their members are subject to statutory regulation, supervision and control, they and their contracts must yield to the exercise of the State's power to protect its people and to care for their welfare. *Home B. & L. Ass'n.* v. *Blaisdell*, 54 S. Ct. 231; 290 U. S.

398; 78 L. ed. 413; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. ed. 309 and cases above cited. *Paul, et al.* v. *Craemer, et al.*, 24 F. Suppl. 353 where statute was upheld which reduced interest on building and loan securities from 6% to 4%. *People* v. *Title & Mortgage Guarantee Co.*, 190 N. E. 153, 264 N. Y. 69, 96 A. L. R. 297. Parties to contracts have no right in the protection of remedies existing at the time of entering into the contract and the state may at liberty change them if a substantial efficacious remedy remains, or is given by means of which a party to it may enforce his rights under the contract—*Richmond Mortgage & Loan Co.* vs. *Wachovia Bank & Trust Company*, 57 S. Ct. 338, 300 U. S. 124, 81 L. ed. 552; *Oshkosh Water Works* v. *Oshkosh*, 187 U. S. 437; 23 S. Ct. 234, 47 L. ed. 249; *Milner* v. *Gibson*, 61 S. W. (2d) 273, 249 Ky. 594; *Dillingham* vs. *McLaughlin*, 264 U. S. 370.

Applying these cases and principles to P. L. 1932 Chapter 102, it easily survives the charge of constitutional invalidity preferred against it.

The economic dislocation with its social consequences under which the nation was and had been suffering and struggling at and prior to the enactment of P. L. 1932, Chapter 102, is familiar to the Court and adequate, complete description of it may be found in opinions of this Court, while the opinion of the Court of Errors and Appeals in *Bucsi* v. *The Longworth B. & L. Association*, 119 N. J. L. 120, 190 Atl. 857, fully outlines the conditions in New Jersey which inspired and required legislative action in the common welfare.

The need for such agencies as the Federal Home Loan Bank System which came into being in the summer of 1932, the Home Owners Loan Corporation, the Reconstruction Finance Corporation and the Federal Savings & Loan

Insurance Corporation, emphasize the effect of the depression upon home owning, mortgages and real estate for all were the products of conditions existent in 1932 and thereafter and all to a greater or lesser degree were designed to aid building and loans and conditions therein and the members thereof and borrowers therefrom. Of the $175,270,510.00 loaned in New Jersey by the H. O. L. C. and for which its bonds were given to Banks, Mortgage Companies, Insurance Companies, other institutions and individuals, the building and loans received approximately Ninety Million, while in the Country as a whole they received $900,000,000, approximately as against total bonds issued of $3,093,000,000.

The conditions with respect to mortgages and homes and home ownership which justified the Court's action in *Home Building & Loan Association* v. *Blaisdell*, 54 S. Ct. 231, 290, U. S. 398, 78 L. ed. 413, were naturally existent as to the building and loan movement in New Jersey and its member borrowers, and affected and applied to the appellee Association.

Action was required. Withdrawal suits and judgments threatened the life of Associations and movement for such actions accentuated an already distressed real estate market, imperilled loans, brought on execution sales, forced liquidation, additional foreclosures, more loss of homes, increased fear by members as to the safety of their investment with resultant further withdrawals and lessened payments on shares and loans or a state of actual or potential insolvency. *Bettle* v. *Republic Savings & Loan Ass'n.*, 63 N. J. Eq. 578; *State* v. *New Schiller B. & L. Ass'n.*, 302 Pa. 544, 153 Atl. 758.

Was the State faced with the alternative of insolvency for these Associations with the consequent injury to the economic welfare of the State and its financial system or

of submitting to the claimed right of the withdrawing shareholders under the 1925 act? Manifestly not. It could and did have recourse to its police power. It was not compelled to allow the tail to wag the dog, the terminating member to dominate the continuing, saving and borrowing member. It was entitled to further regulate all in the interest of all. It was not required to allow the Associations to operate with discrimination and preference for the benefit of the terminating members.

And to forestall this it adopted Chapter 102, Laws 1932 which in effect allowed the Association to do what the State could have done had it taken the Association over and what the Courts could and did do, namely, devote a portion of Association receipts to withdrawing members in order, where sufficient and equally among them if not, with suit suspended as long as such allocation was made; thereby preserving the Association's assets against sacrificial liquidation and the Association for future usefulness when improved conditions should permit renewed savings, sales of real estate for sound prices and regular payment on mortgages.

Appellant says that mathematically as much money would be so paid out to all withdrawing shareholders and the assets depleted as much as if the laws of 1925 were complied with, and that all the 1932 act does is to redistribute such receipts to different people and more people. What appellant overlooks is that compliance with the Laws of 1925 meant discrimination and preference, compliance with 1932, equity and equality; and discrimination meant danger to Association and management in suits by those discriminated against.

Again appellant complains because in the 1932 Act the matured shareholder's rights are recognized, he who has completed his contract; appellant complains and apparently

thinks he should have preference over such shareholder and that the recognition of the matured shareholder impairs appellant's contract. Why a terminating member should be entitled to preference over one who has completed his contract with the Association and his fellows is difficult to see but in any event nothing appears in the complaint or otherwise to show that the operation of this provision of the statute affects appellant injuriously and actually deprives him of a constitutional right. The consideration of the constitutionality of a statute is limited by the exact case presented.

State vs. *Sutton*, 83 N. J. L. 46, 87 N. J. L. 192; 244 U. S. 258, 61 L. ed. 1117.

Again appellant appears to contend that his contract is impaired because the right to sue after six months nonpayment is repealed. In the first place the gift that the Legislature made to those in his class could be taken away or modified by the same conferring power. But in any event it should be borne in mind that Chapter 102, Laws 1932 did not destroy or impair the remedy theretofore existent. The right to sue remains. The new Act merely changed the law from one where suit could not be brought for six months as long as one half the receipts were applied and then not if receipts were applied reflective honestly of the condition of the association; to a situation where under certain circumstances suit might be instituted in ten days or thirty days, dependent upon the association's observance of the law. It merely substituted elasticity of procedure for out moded rigidity, procedure representative of the practice of the Courts in interpreting powers of withdrawal and applying them to varying states of fact, having in mind the members' contract one with the other.

One has only to read the opinion of Justice Roberts in *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, 56 Sup. Ct. Rep. 408 to see how different the Act there under consideration was from the New Jersey Act. There for instance the application of 50% of receipts to withdrawing shareholders was abolished and the amount to be allocated left to directorate discretion—here the 50% provision was retained in the new act and absolute directorate discretion is not conferred. Nor does the provision exist in our Act taking from withdrawing members, receipts earmarked for them and devoting such receipts to the making of new loans, payment of old and new debts, payment of dividends and the creation of reserves for dividends. No such diversion is found in the New Jersey Act.

Chapter 102, Laws 1932 and the other building and loan legislation of that year saved thousands of homes and excepf for it infinitely more than $90,000,000 from the H. O. L. C. must have been needed in New Jersey to steady its mortgage market.

The purpose was public; the end adequate and the statute fairly within the reasoning of the Blaisdell case. As there the *quantum* remained the same and the effect of the legislation was to give the mortgaee about what he could have received had he foreclosed and taken over the property or become a mortgagee in possession. Appellant's interest remained constant, the assets of his Association were protected against sacrificial sale and he was entitled to at least as much as if the Association had gone into liquidation, as it must have done had it recognized the preferential rights of 1925.

Moreover, Appellant's Membership Contract Was Not Impaired.

Those who for the first time in 1903 sponsored the method of withdrawal regulation reflected in Sections 49 and 52, Chapter 65, Laws 1925, were experimenting—they probably never conceived of a situation such as confronted the movement from 1930 on. They were thinking in terms of curbing management against undue and unreasonable withholding of withdrawals. The experience with the contractual system was very fresh in the minds of the sponsors of the new and remediable system of control. They never considered that a means of protecting the shareholder against the management would become a weapon of discrimination and preference and a danger to the movement as a whole. Consequently they did not expressly legislate to cover a situation that they could not foresee or perhaps that they did not think was possible.

Nevertheless because of the ambiguity of the language used and more so because of the contract between member and member, whereby all agreed to participate proportionately in profits and losses and not to overreach one another, our Courts through the late Chief Justice Gummere and other judges construed the 1925 Act as impliedly forbidding recovery by a withdrawing shareholder where it appeared that payment to him would reduce materially the value of the shares of his fellow members, create preference and discrimination and result in an illegal distribution of the assets of the Association. *Richmond* v. *Hercules B. & L. Association* (Docket 58, p. 132) and other unreported cases described, commented upon and followed in *Fornatoro* v. *Atlantic Coast Building & Loan Association,* 10 N. J. Misc. Rep. 1248, 1254; 163 Atl. 240, *Rocker* v. *Cardinal B. & L. Association,* 13 N. J. Misc. Rep. 397 at 403.

Also even where recovery was had in such withdrawal suits the accepted practice was to control execution so that one shareholder might not injure his fellow member. Justice Kephart in *Stone* v. *New Schiller B. & L. Ass'n*, 153 Atl. Rep. 758, page 760, well expresses the situation:

> "Solvency in connection with a building and loan association is not a matter of bookkeeping but of sound business judgment. Where an association is insolvent, as that term is generally understood, or where a succession of withdrawals would precipitate insolvency, or have a strong tendency to do so, a judgment should not be entered in an action by a withdrawing member. A judgment under such circumstances would not be effective. See Christian's Appeal, *supra;* National Savings Loan & Building Association, 9 Wkly. Notes Cas. 79. If a shareholder wishes to force further liquidation, it should be through the proper authorities. Where an investment in a building and loan association turns out to be doubtful and the directors, by careful and prudent management, can save the venture, or greatly minimize the loss, these officers should be given every opportunity to bring the matter to a successful conclusion. This is a fundamental idea of partnership. The difficulty with associations is not always brought on by mismanagement; more frequently it is a depressed real estate market, particularly in times of great economic depression, such as the present. A shareholder owes a duty to his fellow members of the so-called partnership to not place them as well as himself, in a position where unnecessary loss must be suffered. He should not embarrass the association by suit and judgment."

See also *Nice Ball Bearing Co.* v. *Mortgage B. & L. Association*, 310 Pa. 560, 166 Atl. 239.

And as we have herein shown upon insolvency or voluntary liquidation all preferences are levelled.

Thus appellant's rights under the Act of 1925 were by interpretation and practice of the Courts, not substantially different than those which the Legislature expressly legislated into existence. The difference does not justify the claim of impairment.

Indeed the Act of 1932 was an effort to state legislatively the interpretation and practice adopted by the Courts to avoid the injustice, destruction, discrimination, preference, inequity, and inequality of a literal, rigid, legalistic application of the Act of 1925.

Even under the Act of 1925, having in mind his contract with his fellow members the burden was upon appellant to allege and prove that the Association had ample funds on hand to pay appellant and capriciously and unreasonably withheld such funds.

This will be appreciated when it is noted that the limitation upon the required use of one-half of the Association receipts is only limited by the Act to a period of six months. Thereafter the implication is plain that a Court might command more if management is unreasonably failing to apply more. This being so what then becomes of the seeming automatic right to sue after six months non-payment. One seems to negate the other. Each, however, can be given life and that is the duty of the Court in construing the statute in the light of the rights of withdrawing, continuing and borrowing members one to another, the rights of all with the Association, the rights of the Association and the rights of the State. No suit may be maintained even after six months unless the management being able to apply more than one-half of the receipts is unreasonably and capriciously refusing to so apply. The statute contemplated not merely an Association solvent in the legal sense of the term as used with ref-

erence to building and loans but one operating normally and as a going concern. And one seeking relief thereunder must plead and prove that situation which under the statute as properly construed justifies the relief. This the appellant failed to do.

Heinbokel v. *National S. B. & L. Ass'n.*, 58 Minn. 340, 25 L. R. A. 215; *Ronca* v. *New York B. L. B. Co.* 84 N. Y. Supp. 879; *Stilwell* v. *Peoples B. L. & S. Ass'n.*, 57 P. (Utah) 14, 17; *Smith* v. *Reserve Fund B. & L. Ass'n.*, 156 Atl. (Pa.) 902; *Texas Homestead B. & L. Ass'n.* v. *Kerr*, 13 S. W. (Tex.) 1020; *Hoyt* v. *Harbor & Suburban B. & S. Assn.*, 197 N. Y. 113, 90 N. E. 349; *Maloney* v. *Real Estate B. & L. Ass'n.*, 57 Mo. App. 384.

Moreover, P. L. 1932, Chapter 102, did not invade any of the Constitutional rights of appellant upon which he relies in his Assignments but as has been hereinbefore shown was an Act by which he was legally governed in the exercise of his privilege of withdrawal, an Act to which his rights were subject and an Act adopted in the proper exercise of the State's police power.

We respectfully submit, therefore, that the appeal of appellant be dismissed.

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